



[3411-15-P]

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Parts 215 and 218

Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities and Project-Level Predecisional Administrative Review Process

RIN 0596-AD18

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: The U. S. Department of Agriculture (Department) issues this final rule to amend regulations concerning administrative reviews (appeals and objections) for projects or activities that are categorically excluded under the National Environmental Policy Act. The combined effect of the Consolidated Appropriations Act of 2014 and the 2014 Farm Bill makes the 36 CFR Part 215 regulations (post-decisional appeals) obsolete and permits withdrawal in their entirety. An amendment is also made to update the legislative authority provision for 36 CFR Part 218 (pre-decisional objections) and to include a statutory prohibition contained in the referenced legislation. The final rule enables the Department to meet the intent of Congress.

DATES: This rule is effective [Insert date of publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Deborah Beighley, Assistant Director, Judicial and Administrative Review, Ecosystem Management Coordination staff, at 202-205-1277 or via email at dbeighley@fs.fed.us, or Joel Strong, National Litigation

Coordinator, Judicial and Administrative Review, Ecosystem Management Coordination staff, at 202-205-0939 or via email at *jstrong@fs.fed.us*.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Department gives notice that Part 215 of Title 36 of the Code of Federal Regulations is repealed in conformity with the Consolidated Appropriation Act of 2014, Pub. L. No. 113-76, 128 Stat. 5 (January 17, 2014) and the Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (February 7, 2014). Further, technical amendments are made to update the legislative authority provision for Part 218 of Title 36 of the Code of Federal Regulations and to include a statutory prohibition contained in the referenced legislation in 36 CFR 218.23(a). This rulemaking is ministerial in nature.

1. Background

In 1992, Congress enacted the Appeals Reform Act (16 USC 1612 note) (ARA) directing the Secretary of Agriculture to establish a notice and comment process for certain Forest Service projects and activities and modify the agency's voluntarily provided, post-decisional administrative appeal procedures concerning such projects. Implementing regulations were promulgated in 1993 (58 FR 58904) and subsequently revised in 2003 (68 FR 33582). The 1993 and 2003 rulemakings directed that project or activity decisions that had been categorically excluded from documentation in an environmental assessment or environmental impact statement were exempt from the regulatory procedures. That Department's statutory interpretation set forth in the regulations was the subject of litigation. See, for example, *Summers v. Earth Island Institute*, 555 U.S. 488 (2009); *Wilderness Society v. Rey*, 622 F.3d 1251 (9th Cir. 2010); *Wildlaw v. United States Forest Service*, 471 F.Supp.2d 1221 (M.D. Ala. 2007).

On March 19, 2012, the U. S. District Court for the Eastern District of California issued a nationwide injunction permanently enjoining the Forest Service from

implementing 36 CFR 215.4(a) and 215.12(f) (concerning categorically excluded projects). The United States appealed that ruling. In response to the injunction, the Chief of the Forest Service instructed all units of the National Forest System to refrain from applying Sections 215.4(a) and 215.12(f) and to provide notice, comment, and appeal opportunities for all projects and activities implementing forest plans that are documented in a decision memo, decision notice, or record of decision. In addition, Line Officers were instructed to write decision memos for any proposed action or activity that seeks to authorize the sale of timber, and to offer the opportunity for notice, comment, and appeal on these proposed actions.

Just prior to the District Court's ruling, Congress enacted Section 428 of the Consolidated Appropriation Act of 2012, Pub. L. No. 112-74 (December 23, 2011) (2012 Act) superseding the 1993 ARAs administrative review process. Specifically, Congress directed the Secretary to promulgate new regulations implementing a predecisional objection process exclusively for projects and activities documented with a Record of Decision or Decision Notice in lieu of the ARA process. The Secretary published regulations implementing the 2012 Act on March 27, 2013 (78 FR 18481). In light of ongoing judicial and legislative processes, the Secretary reserved taking action concerning the supplanted provisions in the ARA regulations or from addressing whether categorically excluded projects should be included within the new predecisional objection process.

On January 17, 2014, the President signed into law the Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5 (2014). Section 431 of that Act directs that the 1993 ARA and the 2012 Act shall not apply to any categorically excluded project or activity. The legislative history confirmed Congress' intention to return public

involvement processes to the preexisting regulatory norm prior to the date of the District Court's injunction. The legislation recognizes and approves the Department's longstanding interpretation of the Appeals Reform Act in the Part 215 regulations and the Forest Service's other discrete mechanisms for providing for public participation in project development, including its agency National Environmental Policy Act (NEPA) procedures.

On February 7, 2014, the President signed into law the Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649. Section 8006 of that Act: (1) repeals the Appeal Reform Act in its entirety, and (2) repeats the admonition of the recently enacted fiscal year (FY) 2014 Appropriation Act that the predecisional objection process required under the 2012 Act shall not apply to any categorically excluded project or activity. The legislative history again confirms Congress' design to address the management challenge that became apparent following the nationwide injunction by repealing the underlying statute in order to ensure nonsignificant actions may promptly proceed.

As a result of these statutes, the Department has repealed Part 215 and amended Part 218 of Title 36 of the Code of Federal Regulations. As to Part 215, those regulations' sole function was to implement the now repealed 1992 Appeals Reform Act. With the passage of the 2012 Appropriation, FY 2014 Appropriation, and the Agricultural Act of 2014, it is indisputable that nothing remains to the ARA; its implementing regulations, thus, are defunct and obsolete. As to the Part 218 predecisional objection process, the Department has decided to update the authorities citation and replace the existing "reserved" proviso in 36 CFR 218.23(a) with the statutory prohibition of the FY 2014 Appropriation Act and Agricultural Act of 2014. No other changes to 36 CFR Part 218 are

being undertaken at this time.

2. Transition

Congress has plenary authority to direct management of the National Forest System. The Department and Forest Service must faithfully execute all laws. The Department fully appreciates that Congress' instructions are mandatory, immediate, and intended to relieve the agency from any and all obligations under the ARA in order to expedite management activities.

In light of the new legislation and underlying lapse in operational authority, the Forest Service executed an orderly shutdown of Part 215 on March 5, 2014. Specifically, the Forest Service immediately ceased issuance of all notices pursuant to 36 CFR Part 215 and only accepted and conducted an appeal review and disposition where the legal notice of a decision memorandum was published in the newspaper of record on or prior to March 5, 2014. The Forest Service informed affected and interested persons of the legislative enactments and the orderly shutdown procedure.

3. Public Comment

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a final rule without providing advance notice and an opportunity for public comment. The Department has determined that there is good cause for immediate rulemaking without prior proposal and opportunity for comment. The referenced Appropriation and Agriculture laws are mandatory and leave no substantive discretion concerning the matters addressed in this rulemaking. Further, the subject of a technical amendment was

previously noticed and public comment accepted during the March 2013 revision of 36 CFR Part 218. Revision of the authority provision in Part 218 is similarly technical and necessarily ministerial. For the same reasons, the Department finds good cause that these regulations shall be effective immediately pursuant to 5 U.S.C. 553(d)(3).

4. Regulatory Certifications

Environmental Impact

This final rule repeals Part 215 and amends Part 218 of Title 36 of the Code of Federal Regulations governing administrative reviews of certain activities on National Forest System lands. Forest Service regulations at 36 CFR 220.6(d)(2) exclude from documentation in an environmental assessment or environmental impact statement rules, regulations, or policies to establish servicewide administrative procedures, program processes, or instructions. The Department has determined that this final rule falls within this category of actions and that no extraordinary circumstances exist which require preparation of an environmental assessment or environmental impact statement.

Regulatory Impact

This final rule has been reviewed under Department procedures and Executive Order (E.O.) 12866 on regulatory planning and review, as amended by E.O. 13422. It has been determined that this final rule is not significant. This final rule will not have an annual effect of \$100 million or more on the economy, nor will it adversely affect productivity, competition, jobs, the environment, public health or safety, or State or local governments. This final rule will not interfere with an action taken or planned by another agency, nor will it raise new legal or policy issues. Finally, this final rule will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and

obligations of beneficiaries of those programs. Accordingly, this final rule is not subject to review by the Office of Management and Budget under E.O. 12866.

This final rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). This final rule repeals Part 215 and amends Part 218 of Title 36 of the Code of Federal Regulations governing administrative reviews of certain activities on National Forest System lands. The Department has determined that this final rule will not have a significant economic impact on a substantial number of small entities as defined by that Act because this final rule will not impose record-keeping requirements on them; it will not affect their competitive position in relation to large entities; and it will not affect their cash flow, liquidity, or ability to remain in the market.

Federalism and Consultation and Coordination with Indian Tribal Governments

The Department has considered this final rule under the requirements of E.O. 13132 on federalism. The Department has determined that this final rule conforms with the federalism principles set out in this E.O.; will not impose any compliance costs on the States; and will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, the Department has determined that no further determination of federalism implications is necessary at this time.

This final rule does not have tribal implications per E.O. 13175, Consultation and Coordination with Indian Tribal Governments. Therefore, advance consultation with Tribes is not required in connection with the final rule.

No Takings Implications

The Department has analyzed the final rule in accordance with the principles and criteria in E.O. 12630 and has determined that this final rule does not pose the risk of a taking of protected private property.

Civil Justice Reform

The Department has reviewed this final rule under E.O. 12988 on civil justice reform. After adoption of this final rule, (1) all State and local laws and regulations that conflict with this final rule or that impede its full implementation will be preempted; (2) no retroactive effect will be given to this final rule; and (3) it will not require administrative proceedings before parties may file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), the Department has assessed the effects of this final rule on State, local, and tribal governments and the private sector. This final rule will not compel the expenditure of \$100 million or more by any State, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Energy Effects

The Department has reviewed the final rule under E.O. 13211 of May 18, 2001, Actions Concerning Regulations That Significantly Affect Energy Supply. The Department has determined that this final rule does not constitute a significant energy action as defined in the E.O.

Controlling Paperwork Burdens on the Public

This final rule does not contain any record-keeping or reporting requirements or other information collection requirements as defined in 5 CFR Part 1320 that are not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR Part 1320 do not apply to this final rule.

List of Subjects

36 CFR Part 215

Administrative practice and procedure; National forests

36 CFR Part 218

Administrative practice and procedure; National forests

Therefore, for the reasons set forth in the preamble, the Department hereby amends 36 CFR chapter II as follows:

PART 215—NOTICE, COMMENT, AND APPEAL PROCEDURES FOR NATIONAL FOREST SYSTEM PROJECTS AND ACTIVITIES

1. Under the authority of Section 431, Pub. L. No. 113-76; Section 8006, Pub. L. No. 113-79, part 215 is removed.

PART 218—PROJECT-LEVEL PREDECISIONAL ADMINISTRATIVE REVIEW PROCESS

2. The authority citation for part 218 is revised to read as follows:

Authority: Pub. L. 108–148, 117 Stat 1887 (16 U.S.C. 6515 note); Sec. 428, Pub. L. 112–74 125 Stat 1046; Sec. 431, Pub. L. No. 113-76; Sec. 8006, Pub. L. No. 113-79.

3. Amend § 218.23 by adding paragraph (a) to read as follows:

§ 218.23 Proposed projects and activities not subject to legal notice and opportunity to comment.

* * * * *

(a) Any project or activity categorically excluded from documentation in an environmental assessment or environmental impact statement.

* * * * *

_____ June 20, 2014 _____

(date)

Robert Bonnie,
Under Secretary, NRE.

[FR Doc. 2014-18019 Filed 07/29/2014 at 11:15 am; Publication Date: 07/31/2014]